FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-354

STATE OF NORTH CAROLINA,
Petitioner,

v.

WILLIE THOMAS BUTLER,
Respondent.

On Writ Of Certiorari To The Supreme Court of North Carolina

BRIEF FOR THE RESPONDENT

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CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V of the Constitution of the United States provides:

> "No person . . . shall be compeled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

Amendment XIV, Section 1 of the Constitution of the United States provides:

> ". . . (n) or shall any State deprive any person of life, liberty, or property, without due process of law . . ."

QUESTION PRESENTED

SHOULD AN EXPRESS DECLINATION OF THE RIGHT TO COUNSEL BE REQUIRED FROM A SUSPECT PRIOR TO ANY QUESTIONING BY LAW ENFORCEMENT OFFICIALS?

STATEMENT OF THE CASE

The respondent will rely on the Statement of the Case as set forth in the Petitioner's Brief with one exception. Willie Thomas Butler was never asked "Do you want a lawyer?".

SUMMARY OF ARGUMENT

This Court has consistently held that it will indulge every reasonable presumption against a waiver of fundamental constitutional rights and does not presume acquiescence in their loss. *Johnson* v. *Zerbst*, 304 U.S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938). Requiring an express declination of the right to counsel prior to questioning is a concrete guideline that will preserve this Court's principle of indulging every reasonable presumption against waiver of fundamental constitutional rights and will at the same time best insure the even application of the Fifth Amendment privilege. The respondent contends that this express declination of the right to counsel is a sure way to determine whether all types of suspects, both educated and uneducated have knowingly, intelligently and understandingly declined to exercise their right to counsel and presents no obstacle to effective law enforcement

in that law enforcement officals would only be required to ask "Do you want a lawyer?" after the reading of the advice of rights form.

ARGUMENT

I. This Court And Lower Federal Courts Have Consistently Held That The Waiver Of A Known Right, Such As An Accused's Right To Counsel Will Not Be Lightly Presumed.

A substantial body of case law has developed indicating that Courts will indulge every reasonable presumption against waiver of fundamental constitutional rights such as the right to counsel. *Johnson* v. *Zerbst*, supra; *Carnley* v. *Cochran*, 369 U.S. 506, 82 S. Ct. 884, 8 L. Ed. 2d 70 (1962); *Ford* v. *Wainwright*, 526 F., 2d 919 (1976). This court in *Carnley* v. *Cochran*, supra, in applying this principle, stated that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request for the assistance of counsel and that presuming waiver of counsel from a silent record is impermissable. In that case, the record did not show that the trial judge offered and that the accused declined counsel just as the record in this case which does not show that Willie Thomas Butler declined counsel after he was informed of his rights after his reading of the advice of rights form. The record in this case does show that Willie Thomas Butler did not make a request for assistance of counsel, but the failure to request assistance of counsel is not a waiver. *Carnley* v. *Cochran*, supra; *McNeil* v. *Culver*, 365

U.S. 109, 81 S. Ct. 413, 5 L. Ed. 2d 445 (1961). The respondent acknowledges that the cases cited above concern the assistance of counsel in situations other than custodial interrogation but contend that they would be pertinent in view of a suspect's right to be assisted by counsel at a custodial police interrogation.

II. The Miranda Decision Itself Holds That The Rejection Of The Offer Of Counsel Or The Waiver Of Counsel Must Be Specifically Made.

In *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the United Supreme Court said:

> "An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless *specifically* made after the warnings we here delineate have been given . . . (Emphasis added.)
>
> An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. . . ."

The Miranda decision seems to be a culmination of the principles covered in Argument I in that the decision stated that the standard for waiver of counsel is necessarily high, that a valid waiver would not be presumed from the silence of the suspect after the warnings are given nor from the fact that the suspect eventually talked and that a suspect's failure to ask for a lawyer does not constitute a waiver. Willie Thomas Butler never rejected counsel in the manner prescribed by this decision and his waiver should not be allowed to be inferred from the facts that he eventually talked and that he did not make a pre-interrogation request for a lawyer.

The respondent acknowledges that since the Miranda decision that various Circuit Courts have ruled that an express statement that a suspect did not want a lawyer was not required. However, of all the United States Supreme Court cases cited by the Petiioner in his brief, the case of *Brewer* v. *Williams*, 430 U.S. 387, 51 L. Ed. 2d 424, 97 S. Ct. 1232 (1977), seems to present the closest factual situation to this case. The Brewer case concerned incriminating evidence made by a prisoner to police officers as he was being transported from one town to another. He was booked on the charge of abduction in one town and was being transported to another town. The prisoner was advised of his Miranda rights at the arraignment and was advised by a lawyer not to make any statements until he saw his attorney in the other town. When the officers from the other town arrived, one of them repeated the Miranda warnings and during the trip, the prisoner did not express a willingness to be interrogated in the absence of his attorney but stated that

he would tell the whole story after seeing his attorney. One of the officers told the prisoner during the trip that they should stop and locate the body. Subsequently the prisoner made several incriminating statements and directed the officers to the body. The prisoner was convicted of first degree murder and the conviction was affirmed by the Iowa Supreme Court. His petition in Federal District Court for a Writ of Habeas Corpus was granted on the grounds that the evidence in question had been wrongfully admitted at trial and the United States Court of Appeals for the Eighth Circuit affirmed. On Certiorari, the United States Supreme Court affirmed and ruled among other things that there were no reasonable basis for finding that the prisoner had waived the right to the presence of counsel. The Brewer case is similar in that Willie Thomas Butler was advised of his rights and said that he would talk to the officers. Even though in the Brewer case, the prisoner already had an attorney and asserted that he had an attorney, the same principles would be involved since the assistance of counsel could be waived after it had attached.

III. A Requirement Of An Express Declination Of The Right To Counsel Before Questioning Will Insure The Even And Equal Application Of The Fifth Amendment Privilege.

"The privilege against self-incrimination is as broad as the mischief against which it seeks to guard." *Miranda* v. *Arizona*, supra. This mischief, of course, would be police misconduct, which would be encour-

aged with no concrete constitutional guideline as to what is an effective waiver. Armed with a ruling that states that a suspect does not have to expressly decline his right to counsel prior to questioning, law enforcement officials could cleverly create implied waivers of counsel and therefore thwart the main issue as to whether or not the suspect really in fact wants his counsel to be present. The most positive and simple test to determine if all suspects, both illiterate and literate, have knowingly, intelligently and understandingly declined to exercise their constitutional right to counsel is to require law enforcement officials to ask to the suspects specifically if he wants a lawyer after the rights are read to him and then seek an affirmative or negative answer. The petitioner has stated in his brief that the test is not whether the exercise of the waiver is express but whether it is real, but the respondent contends that the most positive method to determine if it is real is to require an express response to, "Do you want a lawyer?". This requirement of an express declination after the asking of this one question would certainly not be a burden to law enforcement officials and would not lead to an absurd result since it would only tell right from the start whether the suspect actually in fact wanted counsel present. A ruling in favor of express declination would provide clear guidelines for law enforcement officials and produce the most positive method to ascertaining in fact whether a suspect wishes to waive his right to the presence of counsel.

CONCLUSION

The right to counsel during custodial interrogation is a very precious and fundamental right and the conditions under which that right may be waived should be stringent with clear guidelines for law enforcement officials to determine if the right has been waived. The respondent contends that this court should again indulge a presumption against waiver and protect the underlying privilege against self-incrimination itself. A requirement for express declination of this fundamental right will insure the even application of the Fifth Amendment privilege and will provide the most error free test for determining if this right has been knowingly, intelligently and understandingly waived. The respondent therefore urges this court to affirm the judgment of the Supreme Court of North Carolina.

Respectfully submitted,

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